Editor's note: Appealed -- aff'd, Civ. No. 74-139-TIC-WCF (D. Ariz. Jan. 12, 1976), 408 F.Supp. 1361, aff'd, No. 76-1548 (9th Cir. March 28, 1977) 552 F.2d 871

ALBERT THOMAS, ET UX.
(CONTESTEES)
v.
SAM A. DeVILBISS, ET UX.
(CONTESTANTS)

IBLA 72-214 Decided February 28, 1973

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., declaring null and void for lack of discovery the Liberty and Liberty Nos. 1 to 5 lode mining claims located in Secs. 22 and 23, T. 22 S., R. 23 E., G. & S.R.M., Arizona. (Contest A 1069).

Affirmed.

Grazing Leases: Generally -- Mining Claims: Contests -- Rules of Practice: Private Contests -- Stock-raising Homesteads

> The owner of a patented stock-raising homestead in which the minerals have been reserved to the United States or a grazing lessee under sec. 15, Taylor Grazing Act, has a sufficient adverse interest under 43 CFR 4.450-1 (1972) to initiate a contest against a mining claimant alleging lack of discovery of valuable minerals.

Mining Claims: Discovery: Generally

> To constitute a discovery upon lode mining claims there must be shown to be a lode or vein within the limits of the claim bearing mineral which would warrant a prudent man in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

APPEARANCES: Richard J. Riley, Esq., of Riley, Smitherman, Whitney, and Slaughter, Bisbee, Arizona, for the contestants; Hale C. Tognoni, Esq., of Tognoni and Pugh, Phoenix, Arizona, for contestees.

OPINION BY MR. HENRIQUES

This case involves the private contest of six mining claims. The facts are concisely set out in the opinion of Administrative Law Judge John R. Rampton, Jr., attached hereto. 1/

Three days of testimony, at times acrimonious in nature, were held. A substantial number of exhibits were introduced. In his opinion, dated November 9, 1971, the Judge, after review of the entire record, declared the claims null and void for lack of discovery. We have carefully reviewed the record and we find ourselves in agreement with the Judge's determinations and hereby adopt his opinion.

On appeal, the contestees press two arguments. The first is premised on a contention that the holder of a patented stock-raising homestead (as the contestants were here) in which the minerals were expressly reserved to the United States, see section 1 of the Act of December 9, 1916, 39 Stat. 862, 43 U.S.C. § 291 as amended by the Act of February 28, 1931, 46 Stat. 1454, does not have an adverse interest in the land sufficient to give him standing to pursue a private contest under 43 CFR 4.450-1. The Judge cited a number of cases showing that the contestants did have the requisite standing. We note that since the decision of the Judge was rendered in this case, the Board of Land Appeals has considered this precise question in Cabot Sedgwick, et al. v. B. H. Callahan, 9 IBLA 216 (1973), and found that the necessary nexus of interest was present and that the stock-raising homestead claimant could maintain a contest. An elaborate discussion of this issue would thus be unwarranted here. The Judge likewise held that a grazing lessee under sec. 15, Taylor Grazing Act, as amended, 43 U.S.C. § 315m (1970), could maintain a contest against an unpatented mining claim. We agree.

The second major issue raised on appeal is that a discovery of valuable minerals was shown by the evidence. We disagree and concur with the Judge's cogent analysis of this question infra.

Finally, contestants have filed a motion to strike from the record various affidavits and letters. We note that the only proper purpose of a tender of evidence on appeal is in support of a motion for a new hearing; such evidence may not be considered or relied upon in making a final decision. United States v. Wayne Winters d/b/a Piedras Del Sol Mining Co., 2 IBLA 329, 78 I.D. 193 (1971);

1/ The title "Hearing Examiner" was supplanted by the title "Administrative Law Judge" by order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

United States v. Glen S. Gunn, et al., 7 IBLA 237 (1972). The allegations made and the affidavits in support thereof do not present any good and sufficient ground for ordering a new hearing and, accordingly, they have not been considered in determining this case on its merits.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques, Member

We concur:

Martin Ritvo, Member

Frederick Fishman, Member.

November 9, 1971

DECISION

SAM A. DeVILBISS and LAURA DeVILBISS, his wife,
Contestants

v.

ALBERT THOMAS and ELLORA THOMAS, his wife,
Contestees

ARIZONA 1069
Involving the Liberty and Liberty Nos. 1, 2, 3, 4 and 5 unpatented lode mining claims, situated in section 22, T. 22 S., R. 23 E., G&SRB&M, Cochise County, Arizona.

Preliminary Statement

A complaint dated June 15, 1967, was filed in the Arizona Land Office, Bureau of Land Management, by the Contestants alleging in essence that the Contestants are owners of the surface estate of the NE<4>, N<2>SE<4>, E<2>NW<4>, NE<4>SW<4> of section 22, Cochise County; that they have a Taylor Grazing Lease on a portion of section 23; and that the Contestees have asserted rights to the Liberty and the Liberty Nos. 1 through 5 lode mining claims, situated on sections 22 and 23. The complaint also charged, in paragraph 4(c), that the mining claims are invalid because:

1. On each of the mining claims located above and upon the described real property, there was no valid discovery as defined by the Mining Laws of the United States.

2. That the real property which is described above is nonmineral in nature and a proper location requires that the property be mineral in nature, the term "mineral" being defined by the Mining Laws of the United States.

3. That contestees, Thomas, has no valid title or claim or assessment work to support his alleged mining operations.

4. That contestees, Thomas, have destroyed surface improvements repeatedly, which belong to the Contestants and have alleged these to be improvements in the mining operations.

On July 10, 1967, the Contestees filed an answer denying the charges in 4(c). The answer questioned the jurisdiction of the Department of the Interior over disputes of the type involved and alleged that no enforceable decision could be rendered, for the Contestees or any entryman would still have the right to enter upon and prospect for minerals and development and mine the same on all the lands in sections 22 and 23.

A hearing was held in Bisbee, Arizona. The Contestants were represented by Mr. Richard J. Riley, Attorney Bisbee, Arizona. The Contestees were represented by Mr. Hale C. Tognoni, Attorney, Phoenix, Arizona.

Standing to Bring Contest

The first issue to be determined is whether the Contestants have standing to bring a contest challenging the validity of mining claims located on lands to which they own the surface resources and lands which are leased to them from the United States Government under the Taylor Grazing Act of June 28, 1934.

The governing regulation, 43 CFR 4.450-1 (formerly 1852.1-1), reads as follows:

> Any person who claims title to or an interest to land adverse to any other person claiming title to or an interest in such land . . . may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

This regulation was construed in the case of Earl G. Davis v. Edith Mohamed, Arizona Contest No. 10,000, and Joseph A. Birchett v. Edith Mohamed, Arizona Contest No. 10,001. The regulation in effect at that time contained the same language as quoted above and was construed by the Director as follows:

> . . . Since minerals are reserved and the surface has been patented, a mining claimant would get only

> minerals and not title to the surface as such; it can be said in a technical sense that the surface claimants are not claiming title adverse to the title of the mining claimant. However, the above provision is broader than that; it refers to title or interest adverse to title or interest of another. Section 9 of the Stock Raising Homestead Act (43 U.S.C. § 299) gives the owner of the minerals the right to re-enter and occupy as much of the surface as is reasonably necessary for his mining operation. Each of the Contestants has alleged that the mining claims could effectively destroy the surface value of the land. The surface patentees do have an adverse interest sufficient to bring contest against allegedly invalid mining claims which threaten to destroy the value of the surface . . . .

Under the same regulation, the 9th Circuit Court of Appeals, in the case of Duguid v. Best, 291 F.2d 235 (1961), cert. denied 372 U.S. 906 (1963), held that the holder of a special use permit granted by the Forest Service, Department of Agriculture, to construct a dam and spillway on National Forest land could bring an action to determine the validity of mining claims in conflict with the special use permit. The Court said:

> Under section 221.51 (43 CFR 221.51) a person who claims title or interest in public lands adverse to any other person claiming title to or interest in such land "may initiate proceedings to have the claim of title or interest to his claim invalidated for any reason not shown by the records of the Bureau of Land Management." By the express language of the regulation, a person who initiates such proceedings seeks only to have invalidated the claim of title or interest of the adversary party against the Government. The adjudication is made not by the person who initiated the proceedings, but by authorized representatives of the United States. Under such regulation there is no transfer of the mantle of sovereignty from the shoulders of the Government to those of a private person. We regard the private contest proceedings as a means or method which is designed to assist the Secretary of the Interior in carrying out his duties to protect the interest of the Government and the public in public lands, in that by such method there may be called to the attention of the Bureau of Land Management invalid claims to title or interest in public

> lands, the invalidity of which does not appear on the record of the Bureau of Land Management and of which the Bureau may be without knowledge. If a claim of title to or interest in public land may be invalidated in a proceedings initiated by the Government we are unable to see why the same results may not be reached in a proceeding initiated by a private person.
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> * * *
>
> Since the purpose and end result of a private contest operates to protect the Government against invalid claims of title to or interest in public lands, we are convinced that such regulation is valid. (Underlining added.)

There would appear to be no question that the surface owner or surface lessee of the United States Government does have the right to bring an action in a forum provided by the Department of the Interior to determine the validity of conflicting mining claims. Moreover, the wording of the regulation is clear that when such an action is brought a ruling can be made that the interest adverse to the person bringing the action may be invalidated. Therefore, if the evidence shows that no discovery has been perfected upon the mining claims owned by the Contestees, the claims may be and will be declared invalid.

The Test for Discovery

Under the mining laws, all valuable mineral deposits are open to exploration and purchase. While the statutes do not prescribe a test for determining what constitutes a discovery of a valuable mineral deposit, the Department and the courts have established a test through a long line of decisions. This test was first laid down in Castle v. Womble, 19 L.D. 455, 457 (1894), in which the Secretary stated, ". . . where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statutes have been met."

This test, known as the "prudent-man rule" has been approved by the Supreme Court of the United States in several cases. Chrisman v. Miller, 197 U.S. 313 (1905); Cameron v. United

States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); United States v. Coleman, 390 U.S. 599 (1968).

With respect to lode mining claims, it has been held that there must be physically exposed within the limits of the claim the vein or lode-bearing mineral of such quality and of such quantity as to justify the expenditure of money for the development of a mine and the extraction of the mineral. Waskey v. Hammer, 223 U.S. 85 (1912). It has also been held that it is not enough that the mineralization found might justify further prospecting or exploration to determine whether actual mining operations would be warranted. United States v. Ford M. Converse, 72 I.D. 141 (1965), affirmed in Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied 393 U.S. 1025 (1969); United States v. Henault Mining Company, 73 I.D. 184 (1966), affirmed in Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied 398 U.S. 950 (1970).

The finding of mineralization alone is insufficient to constitute a discovery of mineral sufficient to validate a mining claim. In the case of Chrisman v. Miller, supra, oil had been found seeping at the surface within the limits of an oil placer mining claim. With respect to mineralization, the Court stated: "It does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration." (p. 320). And further, ". . . the mere indication of presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine in the extraction of the mineral." (p. 322).

In the more recent case of United States v. Coleman, supra, the Supreme Court stated: "The Secretary of the Interior held that to qualify as 'valuable mineral deposits' under 30 U.S.C. § 22 it must be shown that the mineral can be 'extracted, removed and marketed at a profit' -- the so-called 'marketability test'." (p. 600).

The difference between exploratory and discovery work under the mining laws was set forth in the decision of United States v. Ford M. Converse, supra. In that case, the Hearing Examiner found that minerals had been known to exist in the area of the claims for half a century. He found that the mineral samples showing substantial quality had been found within the claims but the problem was to determine whether there was a sufficient

concentration of minerals to justify the cost of development. The Hearing Examiner concluded that there had not been a discovery as required by the mining laws and said the most favorable finding that could be made for the mining claimant was -- there was sufficient evidence of mineralization to induce a prudent man to retain the claims until more extensive exploration had been completed. On appeal, the Department sustained the finding of the Hearing Examiner and said:

> The Department, however, recognizes a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. When minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where minerals are of low value, there must be more exploration work to determine whether these low value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. (p. 149)

The Evidence

The claims in issue are located in an area known as Box Canyon in sections 22 and 23, Township 22 South, Range 23 East, Gila and Salt River Base and Meridian, Pima County, Arizona. Because of the conflict of evidence presented, it is impossible to pinpoint with exactness the location of the claims on the ground. A map of the claims (prepared by Mineral Services Corporation under the supervision of Donald F. Reed, a consulting mining engineer and surveyor) depicts the claim boundaries as pointed out by Mr. Albert Thomas, one of the contestees (Exhibit 82). Mr. Reed did not use the location notices as guides in his survey because, in his opinion, location notices are notoriously inaccurate. Under cross-examination, Mr. Reed admitted that the various shafts, tunnels or adits purportedly within the boundaries of the claims were not shown correctly on the map. In addition, there was an obvious error in other placements of the claims in relationship to the natural features on the ground. Mr. Reed testified that the claim boundaries,

as shown to him by Mr. Thomas, actually lie considerably north of the stream running through Box Canyon (Tr. 359). The map shows the stream bed as running through the approximate center lines of the claims.

Exhibit AC, a map of the claims prepared by Mr. John L. Splane, a consulting mining engineer who examined the claims in behalf of the Contestants, differs materially from Exhibit 82 in its placement of the claims in relationship to each other. Mr. Splane made no claim for the accuracy of the map because he used only the description in the location notices. As a further guide, he used markings found on the ground for the Liberty Nos. 4 and 5 claims as starting points for his survey.

Both engineers admitted there were numerous monuments scattered indiscriminately over the area. Mr. Splane stated the monuments were placed with no apparent rhyme or reason.

Thus, although no map now in evidence can be accepted as completely accurate, for the purpose of this decision it is sufficient to find that the claims are located either on land on which the surface is owned by the Contestants, or upon land owned by the United States and upon which the grazing rights are leased to the Contestants.

The evidence shows a long history of conflict between the Contestants and the Contestees. Trees have been cut, no trespassing and no hunting signs have been posted, and locked gates have been placed across the road leading to the claims which Mr. Thomas says is his right-of-way. The Contestants' cattle have been driven from the area (ostensibly to protect them from injury) when Mr. Thomas has blasted as part of his assessment work. The conflict of interests has led to bitter feelings between the parties and appears to have progressed even beyond the normal or natural confrontation which inevitably arises between surface owner and mining claimant. While this evidence is not relevant to the issue of validity of the claims, it does strengthen the position of the Contestants in establishing conflict of interests sufficient to bring this action.

The Liberty No. 1 claim was first located by C. M. Thomas and Byron G. Thomas in January 1920. The Liberty and the Liberty Nos. 2 through 5 claims were located in June 1934 by Ed E. Thomas, the father of Albert D. Thomas. Contestee Thomas asserts that he acquired these claims by purchase of his father's estate in 1954. Nevertheless, the claims were relocated by him in 1964.

The majority of the workings pre-date the interests of the Contestees, whenever or however acquired, by many years. Mr. Aubrey Harrison Hannon, a frequent visitor to the area since 1910, and Mr. Guy Guess, who has been acquainted with Box Canyon since 1913, testified that they are familiar with the adits, shafts and tunnels and with the monuments scattered about the canyon. Some of the workings were in existence prior to their first visits to the area. Mr. Hannon understood that an attempt to mine the workings was made in 1907. In any event, neither witness had ever seen anyone shipping or processing ore from the adits or tunnels.

The chief witness called by the Contestants to establish the allegation that no discovery exists upon any of the claims contested was Mr. John L. Splane who first examined the Box Canyon area and the Liberty mining claims in September 1955. Because of the uncertainty of the location of the claims, he worked his way up and down the canyon and examined every excavation he could find. He testified that all of the holes were very shallow and the majority exposed no mineralization whatsoever. Where he did find evidence of mineralization in a pit or cut he took a representative sample across the exposed face. On this visit, a total of five samples was cut. He visited the claims for the second time in October 1970 and found one pit, recently freshened, exposing some greenish material which he sampled. Exhibit AE is a tabulation of the assay results of his samplings and is reproduced as Appendix A-1 to this decision.

The highest gross values shown in Exhibit AE are 65 cents a ton in samples 5 and 6. Mr. Splane testified that in a small mine costs for extraction of the raw material will exceed $ 15 a ton, plus transportation and smelting charges. Therefore, based upon the results of the assays, the geologic appearance of the area, and the previous work done in attempting to find mineralization, he would not advise any client of his to invest further time and money in an attempt to develop a mine.

John Pintek, who owns land adjacent to section 22, testified that since about 1960 or 1961 he has been aware of the mining locations claimed by Mr. Thomas and to his knowledge the mining claims have never been worked. In an attempt to show that Mr. Pintek was prejudiced, the attorney for the Contestees asked: "But you don't believe for one minute he has valuable property up there? Answer: No, he told me himself he didn't, he told me down at my place, he told me this

country has all been worked over, and there ain't nothing up there. And I believed him." (Tr. 581).

Mr. Albert Thomas, testifying on his own behalf, asserted that in the 1930's his father and brother mined approximately $ 30,000 worth of gold, silver, chalcopyrite, bornite and lead from the main shaft on the Liberty claim and that the ore was milled and roasted in a small mill near the shaft (Tr. 262). No record of the sales or other corroborating evidence to this record of ore production was offered. A photo (Exhibit 22) was described as the remains or ruins of the smelter which presumably was used to process the ore. However, on rebuttal, Mr. Splane testified that the remains of the structure shown in the photo are unquestionably the foundation for a boiler and that boilers are used in mining operations for hoists or steam pumps, but never for smelters (Tr. 558).

Mr. Thomas identified Exhibits 66, 67, 70, 71 and 72 as qualitative spectrographic analyses of samples taken from the claims by him. Spectrographic analyses, however, have a limited value in evaluating a mineral property, for their main purpose is to determine the presence of minerals rather than amounts. A semiquantitative spectrographic analysis was made of two samples taken by Mr. Thomas from the Liberty and Liberty No. 4 claims (Exhibit 70). In this type of spectrographic analysis some attempt is made by the assayer to determine amounts of minerals present in the sample. Neither sample in Exhibit 70 shows the presence of gold. One sample shows silver, a trace, and the second shows .00067 percent silver. This percentage roughly calculates as .2 ounce silver per ton.

Chemical assays of samples taken by Mr. Thomas were introduced as Exhibits 68, 69 and 71. The results of these assays are shown in Appendix A-2.

Mr. Donald F. Reed, a witness for the Contestees, visited the claims on October 17 and 18, 1970, in company with Mr. Thomas and a crew of two men who assisted him in making a Brunton tape survey of the claim boundaries. A total of 14 samples was taken by Mr. Reed or by members of his crew under Mr. Reed's direction. Because many of the shafts were full of water, eight of the samples were taken from the dumps adjacent to the shafts. He testified that the dump samples were not representative of the minerals found in the dump for he ignored the material which contained no visible minerals. He stated: ". . . there was a doubt that there was proper mineralization

there. So rather than start sampling waste, or very low grade areas, I started to sample the areas that had the most chance." (Tr. 568). The samples were assayed for gold, silver, copper, lead and zinc and the values shown by the assay report and the values of the mineralization found in the samples were tabulated in Exhibit 86 (see Appendix A-3).

Although Mr. Reed was of the opinion that there was a valid mineral discovery on the claims, he admitted that none of the samples showed mineralization of commercial value. Asked about the various stages in mining and developing property, he stated: "There is the prospect, exploratory development and production stage. These [claims] are just prospects. None of them have been explored or developed." (Tr. 376).

Several other witnesses were called by the Contestees. One of these, Mr. George E. Stone, a practical miner, testified that he had examined the mining claims on November 1, 1970. Grab samples were taken by him from several exposed veins which, through visual examination, he believed to contain copper and silver. None of the samples taken were assayed but he stated: ". . . the property is a very good property, the ore is definitely, it is definitely a true vein, the mineral is definitely in the rock real good. And on one end of the claim it starts at two-foot wide, and at the running of 6,000 feet, it improves to 57 inches, to be exact." (Tr. 315). Asked if he thought a prudent man would be justified in locating these claims, he answered: "Sure, I hope they throw it out, I hope they cancel it, so I can locate." (Tr. 315-316).

Mr. Stone made no attempt to obtain representative samples and he does not believe that assays are necessary in evaluating property for the purpose of location of a mining property. He stated that there was enough milling ore in sight to justify going into production and that assays are needed only to check one's returns (Tr. 319-320).

Mr. Henry Smith, Jr., and Richard Smith, brothers and practical miners, testified that they did assessment work on the Liberty mining claims in 1967. In the course of this work they sunk three shafts. Mr. Henry Smith testified he saw mostly lead with some silver and the mineralization he observed resembled minerals which he had seen on other properties which have been developed into mining claims. In answer to the question of whether or not the mineral he saw would be the type he would locate, he stated: "Well, being a prospector, we have done;

I guess I would do it." (Tr. 494). Mr. Richard Smith stated: "I would take a chance at it." (Tr. 504).

Mr. Wayne Winters, an editor of a newspaper in Tombstone, Arizona, and an author of mining pamphlets, also testified for the Contestees. Mr. Winters has had no formal mining training but has bought, sold and prospected for mining properties for a number of years. He inspected the Liberty claims and observed veins showing visible iron, copper staining and silver. Based upon what he observed, he stated that a prudent man would be justified in spending time and money on the claims with a reasonable expectation of developing a paying mine.

A substantial portion of his opinion as to the value of the property was predicated on his studies of the economics of mining. He predicted that in the very near future the market price for both gold and silver would be higher. His prediction has been proven wrong, however, for in the interval between the hearing and this decision the price of gold has remained constant. At the time of the hearing, the price for silver, as given by the experts, was approximately $2.00 per ounce. In the Engineering & Mining Journal, September 1971, the price for silver is quoted as $1.79 per ounce.

None of the witnesses called by the Contestees testified as to the cost of mining. The practical miners based their opinions on visual observance of mineralization only. The only witness for the Contestees who has both practical and technical training in the field of mining was Mr. Reed, and his experience and expertise is not questioned. However, Mr. Reed admitted that his sampling was not truly representative and that his examination was only for the purpose of determining the presence of mineralization. In his opinion, the presence of mineralization is sufficient to validate a mining location. This is not a correct interpretation of the law. The cases previously cited hold that a mining locator cannot base his claim to discoveries on the presence of mineralization coupled with ephemeral hopes and beliefs that the mineralization may improve in quantity or quality at depth or that in some future time the selling price for the mineral may increase. Although he is not required to demonstrate that he has a paying mine, when the values of the minerals exposed would cost more to extract than could be received from their sale it must be presumed that these minerals are worthless. The presumption is rebuttable but only by convincing evidence as to why further development could be justified

Mr. Reed also stated that the claims are mere prospects. Thus, by the admission of the Contestees' own chief expert

witness, further work and better showings of quality and quantity of minerals must be demonstrated before the claims could be classified as being in the second stage of development given by Mr. Reed, i.e., "exploratory development."

The "practical miners" testifying for the Contestees seemed perfectly willing to locate these claims based upon their visual observations of the presence of mineral. Mr. Reed stated that location notices are notoriously inaccurate. Another generalization can be made as to the practical prospector or miner. They are notoriously optimistic. But, although a prospector may be willing to locate a mining claim and another prospector may be willing to honor such a claim on visual observation of minerals in a vein and assays of samples showing values ranging from nil to a small fraction of the costs of extraction, such a showing does not constitute a valid discovery. At best, the activities of Mr. Thomas can be classified as those of one seeking and exploring in the hopes of finding a valid discovery. At worst, the activities of Mr. Thomas appear to be those of a person using the guise of mining locations to harass the surface owners and lessees.

I hereby declare that the Liberty and Liberty Nos. 1 through 5 lode mining claims are null and void for lack of the requisite discoveries on each of them.

Although the mineral estate is still open to location or relocation, nevertheless the surface owner and lessee does have adequate protection under the law against those who might locate for the mineral estate. Under the terms of the Act, 30 U.S.C. § 21, supra, any person can enter upon the lands patented for the purpose of prospecting for mineral. If he, in so doing, injures or damages the permanent improvements of the surface owner he is liable to compensate the surface owner for such damages. An adequate remedy to the surface owner exists in an action which may be brought in the local district courts. Further, the amount of damages can include that damage caused by prospecting, mining or removal of the land which diminishes the value of the surface resources.

John R. Rampton, Jr.
Hearing Examiner

Enclosure:

Information pertaining to Appeals Procedures

See page 13 for distribution.

EXHIBIT AE

	oz. Gold	% Silver	% Copper	% Lead	Gross Value	Description
No. 1 - Grab sample from shaft dump near cemented from windmill. Shaft contains water	0.005	0.3	trace		$.055	4x4 post 400', S35 E.
No. 2 - Grab sample 40' east from Sample No. 1 - from	trace	0.2	0.02		0.40	dump of shallow shaft
No. 3 - Grab sample from Liberty No. 3 location	trace	0.1	trace		0.13	hole dump 8' deep
No. 4 - Face sample M open cut at Liberty wide	trace	0.3	0.02	trace	0.53	No. 4, 3-1/2 feet
No. 5 - Liberty No. 5 Tunnel, from caved	0.005	0.2	0.03		0.65	material at face
No. 6 - Location hole 400' N60W from post Also 250' west of wind-mill. Hole 3.5' deep to bed rock on low side.	0.005	0.2	0.03		0.65	marked N-1 near road.

No. 7 - Grab sample of greenish material from 7' pit which has recently been freshened up at bottom. 1/

Samples No. 1 thru 6 sampled and assayed September 1955; Sample No. 7 sampled and assayed October 1970.

1/ The assay results of this sample were not introduced in evidence.

EXHIBIT 68

	Gold ozs.	Silver ozs.	Copper %	Lead %	Zinc %
Lab. 15697 (A)	0.02	5.78	0.24	24.5	4.2

EXHIBIT 69

	Gold ozs.	Silver ozs.	Copper %	Lead %	Zinc %
Lab. 21483 Liberty	Tr	0.16		0.20	
21484 Liberty 4	Tr	Tr		0.14	
21485 Liberty 5	0.005	0.36			

EXHIBIT 71

	Gold ton	Value	Silver ton	Value	Percentages COPPER	LEAD	ZINC	Identification Liberty:	oz. per ton	oz. per ton
#0 Shaft #2	0.08	$ 2.80	0.95	$ 1.90	0.14	0.40	0.05	#1 Shaft #1	0.04	1.40
0.85	1.70	0.33	0.30	0.02	#1 Shaft #2	0.03	1.05	3.10	6.20	2.25
2.20	0.06	#1 Adit Shaft grab	0.02	0.70	3.00	6.00	0.95	0.19	0.02	from dump #3
#2 Hill Shaft #1	0.02	0.70	0.10	0.20	0.11	0.38	0.02	#2 Main Shaft #2	0.02	0.70
0.60	1.20	0.12	20.2	0.01	#2 New Adit #3	0.02	0.70	0.40	0.80	0.06
1.35	0.22	#3 Dump grab	0.02	0.70	4.00	8.00	0.61	8.20	0.05	#4 Shaft #1
0.02	0.70	0.40	0.80	0.05	3.05	trace	#4 Shaft #2	0.02	0.70	0.25
0.50	0.14	0.64	0.03	#5 Adit #1	0.02	0.70	0.40	0.80	0.05	3.05
trace	#5 Shaft #2	0.02	0.70	0.45	0.90	0.05	9.50	trace	Main Shaft & Cross	0.02
0.70	1.40	2.80	0.30	0.10	0.11	Cut Dump #1				

APPENDIX 3

EXHIBIT 86

Claim	Sample No.	GOLD 1/ oz.	Val.	SILVER 2/ oz.	Val.
Liberty	1	.02	$ 0.70	0.20	$ 0.40
Liberty	2	.02	.70	0.45	0.90
Liberty No. 1	1	.04	1.40	4.00	8.00
Liberty No. 1	2	.02	.70	.20	.40
Liberty No. 1	3	.01	.35	Tr.	--
Liberty No. 2	1	.01	.35	.35	.70
Liberty No. 2	2	.02	.70	.70	1.40
Liberty No. 2	3	.01	.35	.15	.30
Liberty No. 2	4	.01	.35	.25	.50
Liberty No. 4	1	.01	.35	.10	.20
Liberty No. 4	2	.01	.35	Tr.	--
Liberty No. 5	1	.05	1.75	10.40	20.80
Liberty No. 5	2	.02	.70	1.20	2.40
Liberty No. 3	1	.03	1.05	1.00	2.00

Claim	COPPER 3/ %	lbs.	Val.	LEAD 4/ %	lbs.	Val.
Liberty	.03	0.6	$ 0.34	0.16	3.2	$ 0.45
Liberty	.19	3.8	2.13	.05	1.0	0.14
Liberty No. 1	1.42	28.4	15.90	.50	10.0	1.45
Liberty No. 1	.06	1.2	0.67	.06	1.2	0.17
Liberty No. 1	.01	0.2	0.11	.05	1.0	0.14
Liberty No. 2	.02	0.4	0.23	1.40	28.0	4.06
Liberty No. 2	.30	6.0	3.36	2.00	40.0	5.80
Liberty No. 2	.04	0.8	0.45	.06	1.2	0.17
Liberty No. 2	.05	1.0	0.45	4.00	80.0	11.60
Liberty No. 4	.03	0.6	0.34	.30	6.0	0.87
Liberty No. 4	.08	1.6	0.90	.85	17.0	2.56
Liberty No. 5	2.05	41.0	22.96	.95	19.0	2.87
Liberty No. 5	.47	9.4	5.26	.90	18.0	2.72
Liberty No. 3	.10	2.0	1.12	4.80	96.0	13.92

Claim	ZINC 5/ %	lbs.	Val.	Total Val./oz.
Liberty	0.06	1.2	$ 0.18	$ 2.08
Liberty	.03	0.6	0.09	3.96
Liberty No. 1	.01	0.2	0.03	26.78
Liberty No. 1	.01	0.2	0.03	1.97
Liberty No. 1	.008	0.16	0.24	0.84
Liberty No. 2	.008	0.16	0.24	5.58

Liberty No. 2	.092	1.84	0.27	11.53
Liberty No. 2	.02	0.4	0.06	1.33
Liberty No. 2	.031	0.62	0.09	13.10
Liberty No. 4	.072	1.44	0.23	1.98
Liberty No. 4	.03	0.6	0.09	3.90
Liberty No. 5	.042	0.84	0.13	48.51
Liberty No. 5	.04	0.8	0.12	11.20
Liberty No. 3	.095	1.9	0.28	18.37
			14/$ 151.13	
		AVERAGE	$ 10.795	

1/ Figured at $35 per ounce
2/ Figured at $2 per ounce
3/ Figured at $ .56 per ounce
4/ Figured at $ .145 per ounce
5/ Figured at $ .15 per ounce